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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1969

No. [redacted] 184

THOMAS W. SULLIVAN,
Petitioner,

vs.

BOARD OF COMMISSIONERS OF THE ALABAMA STATE BAR,
Respondent.

BRIEF OF RESPONDENT.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 1468.

THOMAS W. SULLIVAN,
Petitioner,

vs.

BOARD OF COMMISSIONERS OF THE ALABAMA STATE BAR,
Respondent.

BRIEF OF RESPONDENT.

INTRODUCTION.

This Brief of Respondent is filed in opposition to a Petition for Writ of Certiorari to the Supreme Court of Alabama. The Respondent respectfully submits that the Petitioner has failed to present any federal question of substance not heretofore determined by this Court or decided in a way probably not in accord with applicable decisions of this Court.

QUESTIONS PRESENTED.

The Petitioner has presented seven questions. The Respondent submits that the questions presented are more clearly and accurately stated as follows:

QUESTION A: Where the Board of Commissioners of the Alabama State Bar in a disciplinary proceeding, which is not a criminal prosecution, found an attorney guilty of violating one of the Rules of the Supreme Court of Alabama Governing the Conduct of Attorneys in Alabama and the Supreme Court of Alabama affirmed the Board's action, without any presumption as to the correctness of the Board's findings, is a substantial constitutional question raised under the Sixth and Fourteenth Amendments, United States Constitution, because certain members of the Board voted to propose to the Supreme Court of Alabama for adoption the Rule which the attorney was found guilty of violating, although they did not entertain any personal bias against the attorney or preconceived convictions as to his guilt or innocence?

QUESTION B: Does the use of depositions in a disciplinary proceeding against an attorney, which proceeding is not a criminal prosecution and can result in a reprimand, suspension or disbarment, but cannot result in fine or imprisonment, raise a substantial constitutional question under the Sixth and Fourteenth Amendments, United States Constitution?

QUESTION C: Do the Rules of the Supreme Court of Alabama Governing the Conduct of Attorneys in Alabama offend the due process clause of the Fourteenth Amendment, United States Constitution, where Rule 36, Section A, condemns "any conduct unbecoming an attorney at law", but Rule 3, Section B, requires that a complaint against an attorney must charge in writing "that such an attorney has violated or failed to comply with one

or more of the rules, referring to such rule or rules by the numbers" and with "such specification of the conduct complained of as will fairly and reasonably give the accused reasonable information of the acts or offenses complained of"?

QUESTION D: Does the Sixth Amendment, United States Constitution, as the same is made applicable to the State of Alabama by operation of the Fourteenth Amendment require a trial by jury in a disciplinary proceeding which is not a criminal prosecution and can result only in a reprimand, suspension or disbarment and not in a fine or imprisonment?

QUESTION E: Where the statutory law of the State of Alabama as interpreted by The Supreme Court of Alabama requires that at least one party to a divorce proceeding be a bona fide resident of the State, does Rule 25, Section A, Rules of the Supreme Court of Alabama Governing the Conduct of Attorneys in Alabama, which prohibits attorneys from introducing perjured testimony on the issue of residency "with knowledge or reasonable cause to believe" that such testimony is false, raise a substantial federal question under the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution?

QUESTION F: Does the First Amendment of the United States Constitution which prohibits any "law respecting an establishment of religion, or prohibiting the free exercise thereof;" as made applicable to the State of Alabama by operation of the Fourteenth Amendment, United States Constitution, require a state to permit divorce by the mere consent of the parties and without regard to their residency?

QUESTION G: Does the due process clause of the Fourteenth Amendment, United States Constitution, prohibit the Supreme Court of the State of Alabama from enact-

ing Rules Governing the Conduct of Attorneys in Alabama proposed by the Board of Commissioners of the Alabama State Bar and prohibit said Board from acting through its committees and officers in investigating, charging and determining the guilt or innocence of an attorney of alleged violations of such Rules?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED.

In addition to the constitutional provisions, statutes and rules set forth in the Appendix to the Petition for Writ of Certiorari, the Respondent calls the following to the attention of the Court as set forth below in the Argument and Appendix to this Brief of Respondent.

STATEMENT OF THE CASE.

The Statement of the Case in the Petition for Writ of Certiorari sets forth accurately and chronologically the general nature of the pleadings filed and the hearings conducted in these proceedings but omits certain details concerning the nature of the charges against the Petitioner which the Respondent deems pertinent.

The Grievance Committee of the Alabama State Bar filed a series of eleven charges against the Petitioner alleging a violation or failure to comply with certain of the Rules of the Supreme Court of Alabama Governing the Conduct of Attorneys in Alabama. Section A of the Rules sets forth a series of duties which are required of attorneys and a series of acts which are prohibited. Section B of the Rules provides a detailed method of procedure to be followed in the investigation and trial of complaints that may be made concerning the conduct of any attorney (239 Ala. XXIII-XXX).

On June 30, 1964, Charges 1, 2, 3 and 4 were filed (R. 1-9). The first three charges alleged that the Petitioner participated in obtaining certain specific divorces in violation of Rule 25, Section A, which proscribes the filing or prosecution of divorce cases ". . . with knowledge or reasonable cause to believe that neither party . . ." is a bona fide resident of the State of Alabama. Charge 4 incorporated by reference the allegations of the first three charges, and charged that in doing the identical specific acts, the Petitioner was guilty of violating Rule 36, Section A, which condemns ". . . conduct unbecoming an attorney at law."

The charges were amended on April 29, 1966, by adding thereto Charges 5, 6 and 7 (R. 20-21A). Each charge relates to the Petitioner's participation in the divorce case of **Ruggerio v. Ruggerio**, Inferior Court of Geneva

County, Alabama, No. A-256, charging a violation of Rule 25, Section A, Rule 16, Section A, and Rule 36, Section A. Rule 16, Section A, prohibits the introduction of false or forged testimony.

On November 14, 1966, four additional charges were filed (R. 228-234). Charge 8 was dismissed and was not considered by the Board of Commissioners. Charges 9, 10 and 11 alleged that Petitioner had accepted certain sums of money from three different non-residents with the assurance that he would obtain divorces in violation of the provisions of Rule 25, Section A; that he failed to obtain such divorces or refund the money in violation of Rule 36, Section A.

On March 3, 1967, the Board found the Petitioner guilty of Charges 5, 6 and 7 (**Ruggerio v. Ruggerio**) (R. 20-21A), and Charge 9 (**Nichols**) (R. 231-232), and fixed the discipline as disbarment as to each charge separately and severally (R. 339-346).

ARGUMENT.

Question A.

Where the Board of Commissioners of the Alabama State Bar in a disciplinary proceeding, which is not a criminal prosecution, found an attorney guilty of violating one of the Rules of the Supreme Court of Alabama Governing the Conduct of Attorneys in Alabama and the Supreme Court of Albama affirmed the Board's action, without any presumption as to the correctness of the Board's findings, is a substantial constitutional question raised under the Sixth and Fourteenth Amendments, United States Constitution, because certain members of the Board voted to propose to the Supreme Court of Alabama for adoption the Rule which the attorney was found guilty of violating, although they did not entertain any personal bias against the attorney or preconceived convictions as to his guilt or innocence?

The Petitioner does not contend that any member of the Board of Commissioners of the Alabama State Bar entertained any personal bias as to the Petitioner, and the record reflects that the members of the Board of Commissioners were impartial in this regard. The Petitioner does not contend that any member of the Board of Commissioners entertained any preconceived convictions concerning the Petitioner's guilt or innocence of the charges, and the record reflects that the Commissioners were impartial in this respect.

The bias which would disqualify a member of the Board from sitting and hearing charges against an attorney must be bias personal to the accused attorney, and the mere fact that a member of the Board might favor the particular Rule which the attorney is charged with violating is of no consequence. It might be safely

assumed that all members of the Board advocate the enforcement of all of the Rules of the Supreme Court of Alabama Governing the Conduct of Attorneys in Alabama, and this assumption might equally apply to the Justices of the Supreme Court of Alabama, who adopted the Rules and thus gave them validity.

To insure a fair and impartial tribunal, Title 46, § 25, Code of Alabama, 1940, provides that "If any member of said Board is a party to the preferment of charges for disbarment or suspension of any lawyer, or there exists as against any member of such Board any cause provided by law for the disqualifications of judges or jurors in civil or criminal cases, such member shall be disqualified from sitting as a member of said board in the hearing of such charges." This statutory provision expressly insures to an accused attorney a fair and impartial tribunal. The Petitioner does not contend that the statute has not been followed.

Wilson v. State, 243 Ala. 1, 8 So. 2d 422, cited by the Petitioner, involved a criminal prosecution, a murder trial, and the alleged bias of the challenged juror was based upon facts completely dissimilar to those in the instant case. **Shapiro v. The City of Birmingham**, 30 Ala. App. 563, 10 So. 2d 38, also cited by the Petitioner, is completely inapposite; it dealt with the violation of a city ordinance and the challenged juror was an employee of the plaintiff city, a policeman charged with the duty of enforcing the ordinance.

Certainly, no substantial question is posed under the Sixth and Fourteenth Amendments, United States Constitution.

Question B.

Does the use of depositions in a disciplinary proceeding against an attorney, which proceeding is not a criminal prosecution and can result in a reprimand, suspension or disbarment, but cannot result in fine or imprisonment, raise a substantial constitutional question under the Sixth and Fourteenth Amendments, United States Constitution?

The charges were duly filed with the Secretary of the Board and the Petitioner personally accepted service. The President entered an order appointing a Commissioner to take evidence and fixed a hearing date as provided by Rule 12, Section B (R. 17); the Secretary gave the requisite notice described in Rule 13, Section B, and a hearing was conducted on September 6, 1966, pursuant to such order and notice (R. 57-184).

At the hearing before the Commissioner thus appointed the testimony of four witnesses was presented and two depositions were tendered in evidence.

Identical procedure was followed and two witnesses testified before the Commissioner on January 9, 1967 (R. 238-285) and the affidavits of two Circuit Judges were put in evidence, there being no objection that this testimony was in affidavit form rather than by deposition.

The testimony was transcribed and filed with the Secretary, who furnished copies thereof to all the members of the Board. At the final hearing before the Board on March 3, 1967, Petitioner was permitted to present the testimony of two witnesses.

It is conceded that the use of depositions is sanctioned by statute, Title 46, Section 25, Code of Alabama, 1940, (A-2), and Rule 19, Section B, Rules of the Supreme Court of Alabama Governing the Conduct of Attorneys in Alabama (A-6).

The Supreme Court of Alabama approved the use of depositions upon the authority of its prior decision, in **Ex parte Messer**, 228 Ala. 16, 162 So. 244. The courts of other states have held that depositions are admissible in disciplinary proceedings against attorneys, such proceedings not being "criminal prosecutions" resulting in fine or imprisonment, but having as their sole function the purging of the role of legal practitioners of an unworthy or disreputable member. **State ex rel. Kehoe v. McRae**, 49 Fla. 389, 38 So. 605; **State v. Mosher**, 128 Iowa 82, 103 N. W. 105.

Clearly the due process clause of the Fourteenth Amendment does not render depositions inadmissible in a proceeding resulting in the revocation of a professional license. In **Missouri ex rel. Horwitz v. North**, 271 U. S. 40, a Missouri statute was upheld which authorized the State Board of Health to revoke licenses to practice medicine for certain specified causes and provided that: "Testimony may be taken by deposition to be used in evidence at the trial of such charges before the Board in the same manner and under the same rules and practice as is now provided for the taking of depositions in civil cases." Petitioner cites no authority for the proposition that depositions are inadmissible in disciplinary proceedings, but states that **Spevak v. Klein**, 385 U. S. 511 has placed in "limbo" the validity of certain statements contained in **Messer**, supra. Petitioner seeks to expand the holding in **Spevak** far beyond anything which the facts of the case or the language of the opinion will warrant. **Spevak** stands for the limited proposition that an attorney cannot be disbarred where the only evidence of misconduct merely consists of his exercising his constitutional privilege to refuse to answer questions or to furnish information on the grounds that such might tend to incriminate him.

Two fallacious assumptions pervade the Petitioner's argument. The Petitioner erroneously defines inquiries by

the judicial department of a state government into the qualifications of one of its officers as "criminal prosecutions" within the contemplation of the Sixth Amendment. The Petitioner further equates such inquiry to a typical "law suit" or judicial trial.

Duncan v. Louisiana, 391 U. S. 194, and **Bloom v. Illinois,** 391 U. S. 194, are clearly distinguishable.

Duncan involved a criminal prosecution in the classical sense, a simple battery, which under Louisiana law is a misdemeanor punishable by a maximum of two years imprisonment and a $300 fine. The case holds that trial by jury in **criminal cases** is fundamental to the American scheme of justice and that the Fourteenth Amendment guarantees a right of a jury trial in all **criminal cases** which—were they to be tried in federal court—would come within the Sixth Amendment's guarantee, and that a **crime** punishable by two years imprisonment is a serious crime requiring a jury trial, and not a more petty offense.

In **Bloom** it was held that prosecutions for serious criminal contempts are subject to the jury trial provisions of the Federal Constitution, and the Sixth Amendment, which is made binding on the states by virtue of the due process clause of the Fourteenth Amendment. The defendant's demand for a jury trial had been denied in the state court, and he was found guilty and sentenced to 24 months imprisonment. The opinion carefully notes that a criminal contempt proceeding is exactly parallel to a criminal prosecution in the classical concept, in both its objectives and results.

> ". . . serious contempts are so nearly like other serious crimes that they are subject to the jury trial provisions of the Constitution, now binding on the States . . ."
>
> "Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is

punishable by fines or imprisonment or both . . ."
"Criminally contemptuous conduct may violate other provisions of the criminal law; but even when this is not the case convictions for criminal contempt are indistinguishable from ordinary criminal convictions, for their impact on the individual defendant is the same. Indeed, the role of criminal contempt and that of many ordinary criminal laws seem identical—protection of the institutions of our government and enforcement of their mandates."

Pointer v. Texas, 380 U. S. 400, is the only case cited by the Petitioner which even touches on the Sixth Amendment right to confrontation. The case merely holds that the transcript of the testimony of a complaining witness given at a preliminary hearing, at which the defendant, a **layman**, who had no counsel, did not cross-examine, is inadmissible at the defendant's trial for the **crime** of robbery. The Petitioner in the instant case, an attorney, has been represented throughout all proceedings by able counsel and all witnesses have been subjected to thorough cross-examination, although he made no appearance at the taking of certain depositions, either by writing, by counsel, or in person.

Duncan and **Pointer** involved "criminal prosecutions", and **Bloom** was concerned with criminal contempt which ". . . is a crime in the ordinary sense . . ."

In contrast, all courts have consistently held that an investigation of the conduct of an attorney as an officer of the courts is not a criminal proceeding.

As early as 1869, in holding that a judge was not civilly liable for his removal of an attorney as an officer of the court, this Court in **Randall v. Brigham**, 74 U. S. 523, described the nature of disbarment proceedings as follows:

> "All that is necessary to their validity is that . . . notice should be given to the attorney, of the charges made, and opportunity afforded him for explanation and defense. The manner in which the proceeding shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation."
>
> . . .

In rejecting the claim that the attorney had been denied certain rights afforded defendants in criminal prosecutions under the Massachusetts Constitution, the court observed:

> ". . . It has held that the proceeding taken for the removal of the plaintiff could not, in any just and proper sense, be deemed a criminal procedure, in which a party has a right to a full, formal and substantial description of the offense charged; and that it was not essential to the validity of the order of removal that it should be founded on legal process, according to the signification of the words 'per legem terrae' as used in the Magna Charta, or in the Declaration of Rights."

In discharging a rule to show cause why a disbarment order of a United States District Judge should not be vacated, this Court in **Ex parte Wall**, 107 U. S. 265, stated:

> "The proceeding is, in its nature, civil, and collateral to any criminal prosecution by indictment. The proceeding is not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministrations of persons unfit to practice in them."

The Petitioner was afforded due notice of all proceedings, was afforded an opportunity to cross-examine all witnesses and to present such testimony in his own behalf

as he might desire. The Petitioner has presented no authority for the proposition that the use of depositions in a disciplinary proceeding offends any provision of the United States Constitution, and the cases involving criminal prosecutions or criminal contempt proceedings have no application.

Question C.

Do the Rules of the Supreme Court of Alabama Governing the Conduct of Attorneys in Alabama offend the due process clause of the Fourteenth Amendment, United States Constitution, where Rule 36, Section A, condemns "any conduct unbecoming an attorney at law", but Rule 3, Section B, requires that a complaint against an attorney must charge in writing "that such an attorney has violated or failed to comply with one or more of the rules, referring to such rule or rules by the numbers" and with "such specification of the conduct complained of as will fairly and reasonably give the accused reasonable information of the acts or offenses complained of"?

Petitioner was found guilty of Charges Five, Six, Seven and Nine. Charges Seven and Nine alleged a violation of Rule 36, Section A, which condemns "any conduct unbecoming an attorney at law". To test the validity of Rule 36, Section A, it must be read in *pari materia* with the entire body of the Rules, which describe in Section A the actions on the part of attorneys which are specifically required or prohibited and in Section B, sets forth the method of procedure to be followed in the investigation and trial of complainants.

Rule 3, Section B, provides:

> "It shall be sufficient for any complaint against any attorney to charge in writing that such an attorney has violated or failed to comply with one or more of the rules, **referring to some rule or rules by the**

> **numbers hereinabove set forth**, and such specification of conduct complained of as will **fairly and reasonably give the accused reasonable information of the acts or offenses complained of**" (Emphasis added).

It is thus obvious that an attorney is afforded an opportunity to (a) establish that he did not perform the acts which are the subject of the complaint, and (b) if the acts are admitted, establish that the acts do not constitute a violation of a specific rule.

The Board of Commissioners of the Alabama State Bar, which promulgated the Rules, and the Supreme Court of Alabama, which approved the Rules and gave them validity, felt that a basically dishonest but ingenious individual might carefully pattern his conduct so as to circumscribe, though narrowly, every Rule other than Rule 36, Section A, and nevertheless, be guilty of conduct which deserved, if not demanded, discipline. It was felt that in dealing with an honorable profession rather than a purely commercial trade, some comprehensive rule was necessary, in order to prevent the fundamentally unethical from carefully avoiding the violation of some specific rule, but whose actions manifestly demonstrated a breach of the high standards demanded of attorneys as officers of the courts.

To demonstrate that other courts are in agreement with this view, we need look to no less an authority than the Supreme Court of the United States. Rule 8, Revised Rules of the Supreme Court of the United States, provides:

> "Where it is shown to the court that any member of its bar. . . . has been guilty of conduct unbecoming a member of the bar of this court, he will be forthwith suspended from practice before this court." Applied in **In re Baker**, 297 U. S. 691.

Rule 46 (b) Federal Rules of Appellate Procedure, is substantially identical (A-1).

Statutes, rules of court, or rules promulgated by bar associations, which are similar, if not identical, to Rule 36, Section A, Rules of the Supreme Court of Albama Governing the Conduct of Attorneys in Alabama, exist in many states. The discipline of a professional group would be difficult, if not impossible, without a rule of similar import.

Petitioner's contention that the procedures by which a court strikes the name of an attorney from the roster of its officers as unworthy to remain thereon should be treated as "strictly criminal" has never been embraced by any court. **Randall v. Brigham**, supra, and **Ex Parte Wall**, supra.

The high standards of the profession have developed over centuries, and present no mystery to the well intentioned practitioner. In matters of ethics, an attorney seldom errs through ignorance. In testing a statute or rule for alleged impermissible vagueness practicalities must be considered, together with the evil which the statute is designed to prevent.

The qualities of character which entitle one to become an attorney and officer of courts of a state and a member of the bar of the Supreme Court of the United States must be stated in general terms rather than confined to a series of precise and specific "Thou shalt nots."

In **Schware v. Board of Bar Examiners of New Mexico**, 353 U. S. 232, this Court approved Rule 1, Rules Governing Admission to the Bar of New Mexico, which provides: "An applicant for admission to the Bar, either upon examination or upon certificate and motion must be . . . of good moral character . . ." N. M. Stat. Ann., 1953, No. 18-1-8, stating:

> "A state can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any quali-

fication must have a rational connection with the applicant's fiitness or capacity to practice law."

Frankfurter, J., concurring, noted that the standards governing the profession cannot be stated within precise bounds.

> "Nor is the division of power between this Court and that of the States in such matters altered by the fact that the judgment here challenged involves the application of a conception like that of 'moral character' which has shadowy rather than precise bounds. It cannot be that that conception—moral character—has now been found to be so indefinite, because necessarily implicating what are called subjective factors, that the States may no longer exact it from those who are to carry on 'the public profession of the law.' (See Elihu Root, in 2 A. B. A. Jr. 736). To a wide and deep extent, the law depends upon the disciplined standards of the profession and belief in the integrity of the courts. We cannot fail to accord such confidence to the state process, and we must attribute to its courts the exercise of a fair and not a biased judgment in passing upon the applications of those seeking entry into the profession . . ."

In **Konigsberg v. State Bar of California**, 353 U. S. 252, the requirement was again approved, this Court (Black J.) observing:

> "The term 'good moral character' has long been used as a qualification for membership in the Bar and has served a useful purpose in this respect."

Rule 36, Section A, Rules of The Supreme Court of Alabama Governing the Conduct of Attorneys in Alabama prohibiting "conduct unbecoming an attorney at law," and Rule 8, Revised Rules of the Supreme Court of the United States prohibiting "conduct unbecoming a mem-

ber of the bar of this court," when measured against a background of experience extending over centuries of development of standards of honesty and fairness of members of an honorable profession is even more definitive than "good moral character," a test for admission to the bar which has been specifically upheld, **Schware v. Board of Bar Examiners of New Mexico**, supra, and **Konigsberg v. State Bar of California**, supra.

The Petitioner does not even imply that the specific conduct described in Charges Seven and Nine does **not** constitute "conduct unbecoming an attorney at law," and if a state applied an admittedly permissible standard when there was no basis for its finding that such standard was not met, or where its action was invidiously discriminatory, relief to the aggrieved party would be clearly available. **Schware v. Board of Bar Examiners of New Mexico**, supra, and **Konigsberg v. State Bar of California**, supra.

Terms such as "unprofessional conduct" or "conduct unbecoming" a member of a profession such as law or medicine are not unconstitutionally vague. **Brinkley v. Hassig** (1936 CA 10th Kan.), 83 F. 2d 351; **Yoshizawa v. Hewitt** (1931 CA 9th Hawaii), 52 F. 2d 411 ("gross carelessness or manifest incapacity"); **Lehmann v. State Board of Public Accountancy**, 236 U. S. 394 ("any unprofessional conduct"). The view is generally expressed that such terms acquire an understandable meaning within a particular profession.

In the case of **Ex parte Secombe**, 60 U. S. 9, a rule to show cause why the peremptory writ of mandamus should not issue commanding the Judges of the Supreme Court of the Territory of Minnesota to restore an attorney to his office was denied. The opinion pointed out that a Minnesota statute described in only general terms some

of the offenses for which attorneys might be removed, and observed:

> "Indeed, it is difficult, if not impossible, to enumerate and define, with legal precision, every offense for which an attorney or counselor ought to be removed. And the Legislature, for the most part, can only prescribe general rules and principles to be carried into execution by the court with judicial discretion and justice, as cases may arise."

Of course, in making the determination that a lawyer is guilty of conduct unbecoming an attorney at law, the conduct in question must be such as is generally condemned by all responsible members of the bar. The Petitioner does not argue that his conduct described in Charges Seven and Nine does not fall within that category, and does not seek review upon that ground.

We again emphasize that the Rules must be read as a whole. If an attorney entertains doubts as to the ethical propriety of contemplated action, he is adequately protected by Rule 37, Section A, which provides:

> "But no attorney shall be subject to disciplinary measures for any action on his part, who, prior to such action has received from the Grievance Committee its written opinion that such action was justifiable or permissible."

Petitioner's challenge of Rule 36, Section A, Rules of the Supreme Court of Alabama Governing the Conduct of Attorneys in Alabama raises no substantial federal question under the due process clause of the Fourteenth Amendment, United States Constitution.

Question D.

Does the Sixth Amendment, United States Constitution, as the same is made applicable to the State of Alabama by operation of the Fourteenth Amendment require a trial by jury in a disciplinary proceeding which is not a criminal prosecution and can result only in a reprimand, suspension or disbarment and not in a fine or imprisonment?

On June 13, 1966, the Petitioner filed with the Board of Commissioners his Motion to Dismiss Complaint, as Amended (R. 22-25), and as ground 13 contained therein asserted that the proceedings were void for failure to provide a trial by jury in violation of the state and federal constitutions. Assignment of Error 9 filed with the Supreme Court of Alabama assigned as error the Board's action in overruling the Motion to Dismiss Complaint, as Amended, referring to the Motion filed on June 13, 1966, and to similar motions filed on September 6, 1966, October 31, 1966, and December 12, 1966. These various motions contain 33 distinct paragraphs or grounds. The right to trial by jury was never argued before the Supreme Court of Alabama in briefs or in oral argument, and a reading of the opinion of said Court (Appendix A, pp. A1 through A17, Appendix to Petition for Writ of Certiorari) will readily reveal that this proposition was never even considered. Petitioner cannot assert this alleged right for the first time before the Supreme Court of the United States when the Supreme Court of Alabama was given no opportunity to pass upon his claim.

The Petitioner again erroneously assumes that the objective and result of an inquiry by the judicial department of a state or the federal government into the qualifications of an officer of the courts is to mete out "punishment." This contention has been emphatically refuted

by every court which has addressed the subject. **Randall v. Brigham**, supra, and **Ex parte Wall**, supra.

The Petitioner cites only one authority, namely, **Bloom v. Illinois**, supra. There this Court was very careful to draw the almost identical parallel between a criminal contempt proceeding and the prosecution for the violation of a criminal statute. The analogy fails when we are dealing with an investigation into the conduct of a member of the bar. Any hardship which may be inflicted upon an offending attorney is incidental to the only real objectives and results of such proceedings which is **protection** of the courts, the legal profession generally, and the public at large and not **punishment**, as described in criminal prosecutions and criminal contempt proceedings.

The Supreme Court of the United States and other federal courts have disciplined attorneys as members of their respective bars and no right to trial by jury has been afforded by virtue of the provisions of the Sixth Amendment, United States Constitution, which guarantees such right "In all criminal prosecutions . . .". The Petitioner does not claim that such right to jury trial existed at common law at the time of the adoption of the Constitution of the United States (Inasmuch as a proceeding is now pending before the Supreme Court of the United States which could lead to Petitioner's disbarment as a member of such Court under Rule 8, Revised Rules of the Supreme Court of the United States, **In the Matter of the Disbarment of Thomas W. Sullivan**, No. 2000 Misc., and inasmuch as the decision and opinion of the Supreme Court of Alabama is not conclusive in such proceeding, and issues of fact could be independently pursued therein, **In re Isserman**, 345 U. S. 286, 348 U. S. 1, **Selling v. Radford**, 243 U. S. 46, we assume that the petitioner will raise his alleged Sixth Amendment right to jury trial before the Supreme Court of the United States.)

It would be a strange anomaly if the Fourteenth Amendment, which makes the Sixth Amendment applicable to the State of Alabama required the state courts to afford a jury trial in a disbarment proceeding while the Sixth Amendment of its own force imposed no such requirement upon the federal courts.

Question E.

Where the statutory law of the State of Alabama as interpreted by the Supreme Court of Alabama requires that at least one party to a divorce proceeding be a bona-fide resident of the State, does Rule 25, Section A, Rules of the Supreme Court of Alabama Governing the Conduct of Attorneys in Alabama, which prohibits attorneys from introducing perjured testimony on the issue of residency "with knowledge or reasonable cause to believe" that such testimony is false, raise a substantial federal question under the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution?

The Supreme Court of Alabama has held that one party to divorce proceeding must be a bona fide resident of the state. **Jennings v. Jennings**, 251 Ala. 73, 36 So. 2d 236.

The Petitioner cites certain cases in which one of the parties to a divorce proceeding because of laches or estoppel was precluded from attacking the validity of a decree. **Levine v. Levine**, 262 Ala. 491, 80 So. 2d 235; **Lutsky v. Lutsky**, 279 Ala. 185, 183 So. 2d 782.

Petitioner asserts "Rule 25, Section A, as amended, causes the obtaining by an attorney of basically legal results to be denominated unethical." Petitioner, thus, would appear to condone the action of an attorney in perpetrating a fraud upon the court if he obtained "legal" results.

Whether or not the evidence as to residency is sufficient is obviously a question of fact reviewable on appeal. **Levy v. Levy**, 256 Ala. 629, 56 So. 2d 344; **Hilley v. Hilley**, 275 Ala. 617, 157 So. 2d 215.

However, the validity *vel non* of the divorce decree is beside the point. The possible laches or estoppel of a party is equally beside the point. It is the conduct of the attorney with which Rule 25, Section A, is concerned. The fact that there may be three parties to the perpetration of a fraud upon the court, namely, the complainant, the respondent and the attorney, and the circumstances are such that perhaps both complainant and respondent are estopped to challenge the validity of the decree, does not purge the attorney of wrongdoing if he, in fact, had "knowledge or reasonable cause to believe that neither party . . ." was a bona fide resident. As the Supreme Court of Alabama stated in the opinion below, "Rule 25, Section A, in no way departs from the applicable divorce statutes as to jurisdiction, nor the decisions thereunder, but re-enforces these principles." It is difficult to conceive that the due process and equal protection clauses of the Fourteenth Amendment, United States Constitution, could preclude a state from attempting to prevent attorneys from perpetrating a fraud upon its courts.

Question F.

Does the First Amendment of the United States Constitution which prohibits any "law respecting an establishment of religion, or prohibiting the free exercise thereof"; as made applicable to the State of Alabama by operation of the Fourteenth Amendment, United States Constitution, require a state to permit divorce by the mere consent of the parties and without regard to their residency?

The Petitioner appears to argue for "divorce by consent", i. e., the only grounds necessary therefor being

the expressed desire of the parties to be divorced, and further contends that a state cannot constitutitionally impose the requirement that one party to the divorce proceeding must be a bona fide resident of the state.

The Petitioner seems to attack the divorce requirements of the State of Alabama rather than Rule 25, Section A, which, in effect, prohibits attorneys from presenting perjured testimony concerning residency in divorce proceedings "with knowledge or reasonable cause to believe . . ." that such testimony is false. The constitutional validity, *vel non*, of Rule 25, Section A, is the only matter that should properly be considered in the instant case.

Petitioner asserts that the law governing divorce had its origin in the ecclesiastical courts of England; that to deny parties the right to "divorce by consent" regardless of the true residency of the parties is a violation of the First Amendment prohibition against "law respecting an establishment of religion, or prohibiting the free exercise thereof;" as made applicable to the states by the Fourteenth Amendment.

The fact that many federal laws and numerous laws of many states had their origins in the views of certain religious sects does not render them constitutionally infirm. The fact that the public policy reflected in such laws may parallel certain religious notions concerning the health, safety and general welfare of the community is of no consequence.

In **Reynolds v. United States**, 98 U. S. 145, a statute making bigamy a crime and imposing penalties therefor was upheld although plural marriages were sanctioned, and even required, by the defendant's religious beliefs, and in **McGowan v. Maryland**, 366 U. S. 420, the State's Sunday Closing Laws were held valid although concededly

the observance of Sunday as a day of rest had its origin in the tenets of certain Christian sects. Mr. Chief Justice Warren, in announcing the opinion of the Court, stated:

> ". . . . There is no dispute that the original laws which dealt with Sunday labor were motivated by by religious forces . . .
>
> . . . the 'Establishment Clause' does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation. Thus, for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judaeo-Christian religions while it may disagree with others does not invalidate the regulation. So, too, with the questions of adultery and polygamy. **Davis v. Beason**, 133 U. S. 333; **Reynolds v. United States**, supra. The same could be said of theft, fraud, etc., because those offenses were also proscribed in the Decalogue."

Despite the religious overtones in the law of marriage and divorce, the state of the true domicile of the parties has a vital interest, aside from religious considerations, since broken homes can, and often do, result in destitute parties or children who become wards of the state. The state of the true domicile of the parties is saddled with these tragic problems, not the State of Alabama.

An officer of the courts, should be subject to discipline for submitting perjured testimony "with knowledge or reasonable cause to believe" in its falsity, and the fact that the laws of Alabama on the subjects of marriage and divorce may coincide with some religious views does not deprive the parties to the divorce, and much less the

Petitioner, of any right protected by the "establishment" and "free exercise" clauses of the First Amendment.

Question G.

Does the due process clause of the Fourteenth Amendment, United States Constitution, prohibit the Supreme Court of the State of Alabama from enacting Rules Governing the Conduct of Attorneys in Alabama proposed by the Board of Commissioners of the Alabama State Bar and prohibit said Board from acting through its committees and officers in investigating, charging and determining the guilt or innocence of an attorney of alleged violations of such Rules?

The Petitioner makes reference to no specific provision of the Bill of Rights, but relies upon the general due process clause of the Fourteenth Amendment. He cites no authority whatsoever to support his contention that the Fourteenth Amendment, United States Constitution, prohibits the Judicial Department of State Government acting through the Supreme Court of Alabama, the Board of Commissioners of the Alabama State Bar and its committees and officers from dealing with all phases of a proceeding concerning the investigation of an attorney's conduct.

The Supreme Court of Alabama, as the head of the Judicial Department of State Government, establishes rules governing the conduct of attorneys as officers of said Court upon the recommendation of the Board of Commissioners of the Alabama State Bar.

Petitioner appears shocked at the fact that the Supreme Court of Alabama and the Board of Commissioners through its committees and officers are involved in all phases of the procedures involving the discipline of attorneys. We assume that the Petitioner is equally shocked at the fact that the Supreme Court of the United States is involved in all

phases of the procedures dealing with the discipline of its officers as evidenced by the pending proceedings against the petitioner. **In the Matter of the Disbarment of Thomas W. Sullivan**, No. 2000, Misc., wherein the Petitioner has been afforded the opportunity to show cause why he should not be disbarred from the Supreme Court of the United States because of the decision and opinion of the Supreme Court of Alabama disbarring Petitioner from practice before said Court. The Supreme Court of the United States enacted Rule 8, will make a determination as to Petitioner's violation thereof, and execute an order of disbarment if a determination of guilt is its conclusion. In effect, the Supreme Court of the United States will act as rule maker, accuser, prosecutor, judge and jury.

The Petitioner completely misconceives the essential nature of the proceedings leading to the removal of an attorney as an officer of the courts.

The action of the judicial department of the federal government and of the judicial departments of state government in determining whether attorneys must be removed as officers of their respective courts is essentially a judicial rather than an "executive" or "legislative" function. This is true of every step of the proceedings from the establishment of rules of conduct, and determination of a violation thereof, to the striking of an accused attorney's name from the roster of the officers of the court.

This Court through affirmance on April 28, 1969, **Sullivan v. Alabama State Bar**, October Term 1968, No. 1170, held that the "one man, one vote" principle has no relevancy to the Board of Commissioners of the Alabama State Bar. The United States District Court had observed that the powers conferred upon the Board are more judicial than legislative in nature quoting from **Ex parte Thompson**, 228 Ala. 113, 152 So. 229, as follows:

"The Supreme Court of Alabama has held that in reviewing disbarment proceedings 'this court is in the exercise of its original and inherent powers in the matter of disbarment of attorneys at law.' The powers conferred upon the Board of Commissioners of the Alabama State Bar are more judicial than legislative in nature. They were so treated by the Supreme Court of Alabama in the leading case of **Ex parte Thompson,** 1933, 152 So. 229, 238, 239:

'We will now address ourselves to a consideration of the question whether the Legislature of Alabama acted within constitutional bounds in creating the board of commissioners of the state bar, and in conferring upon it the powers enumerated in the act. No doubt it was attempted to confer upon the board thus created powers highly judicial in nature. This board is given authority to formulate rules governing the conduct of all persons admitted to practice and to investigate and pass upon all complaints that may be made concerning the professional conduct of any person who has been or who may hereafter be admitted to the practice of the law, and to formulate rules governing the reinstatement of members of the bar who have been disbarred and to pass upon all petitions for reinstatement. The board is empowered to provide for the taking of evidence, and, on hearing of any complaint against an accused attorney, in all cases in which the evidence, in the opinion of a majority of the board, justifies such a course, they are required to take such disciplinary action by public or private reprimand, suspension from the practice of law, or exclusion and disbarment therefrom as the case shall in their judgment warrant, provided that in cases of exclusion or disbarment a majority of the board shall vote affirmatively before the exclusion and disbarment shall become effective. But the rules

and regulations which may be formulated and adopted by the board shall not become effective until the same shall have received the approval of this court, and the right of this court to approve or disapprove all or any part of the rules so formulated and adopted by the board is fully reserved to this court. More than this, this court is expressly given the right to review on petition of party aggrieved, the action of the board, *and may, on its own motion, and without the certification,* inquire into the merits of the case, and take *any action,* agreeable *to their judgment.* If this court should desire it, additional testimony may be taken.' ".

"Section 139 of the Constitution, as presently pertinent, reads:

" 'The judicial power of the state shall be vested in the senate sitting as a court of impeachment, a supreme court, circuit courts, chancery courts, courts of probate, such courts of law and equity inferior to the supreme court, and to consist of not more than five members, as the legislature from time to time may establish, *and such persons as may be by law invested* with powers of a judicial nature. * * *' (Italics supplied.)

"Thus we find express constitutional warrant for conferring upon *this board* judicial functions; and this conclusion is supported by the decision of this court in the case of State Tax Commission v. Bailey & Howard, 179 Ala. 620, 60 So. 913. We fail to see, in the creation of the board of commissioners of the state bar with the powers conferred, any transgression of constitutional bounds by the Legislature, and, as for any constitutional objections assigned, and here argued, we hold that the act does not violate any of the provisions of the Constitution urged and assigned by appellant."

"Thus it appears that the State Supreme Court, in the exercise of its original and inherent powers in disbarment proceedings, can remedy any errors committed by any claimed malapportionment of the Board of Commissioners."

The Petitioner begins with the conclusion that the instant case presents classic reasons for granting the Writ of Certiorari but fails to cite any authority or demonstrate that the Supreme Court of Alabama has decided a federal question of substance not heretofore determined by this Court or has decided it in a way probably not in accord with applicable decisions of this Court. The Petitioner makes the bald assertion that the procedures employed by the Board of Commissioners of the Alabama State Bar and the Supreme Court of Alabama are strikingly similar to the methods used by the High Commission in England in the latter part of the Sixteenth Century in exposing heretics. This initial statement by Petitioner demonstrates the absurdity of his position. The Petitioner sets forth no single novel issue but relies upon a culmination of procedural steps, each of which has been upheld as valid and which insure an accused attorney of every opportunity to prove his innocence of the charges and present any defense available to him.

The statute, Title 46, Section 36, Code of Alabama, 1940 (A-4), and Rule 6, Section B, Rules of the Supreme Court of Alabama Governing the Conduct of Attorneys in Albama (A-5) required that the charges filed against the Petitioner on June 30, 1964, April 29, 1966, and November 14, 1966, be served upon the Petitioner, and in the instant case, the Petitioner accepted service thereof.

Title 46, Section 36, Code of Alabama, 1940, provides:

"Any member of the bar complained of shall have notice and opportunity to defend by the introduction of evidence and the examination of witnesses called

against him, and the right to be represented by counsel. He shall also have the right to require the secretary to summon witnesses to appear and testify or produce books, papers, documents or other writings necessary or material to his defense in like manner as above provided."

Rule 10, Section B, Rules of the Supreme Court of Alabama Governing the Conduct of Attorneys in Alabama (A-5), provides that an accused attorney may file his written plea or pleas directed to the charges and further provides that if no plea be filed, the matter shall proceed as if the plea of the general issue had been interposed.

The Petitioner filed numerous pleadings in these proceedings, namely, Plea in Abatement, July 21, 1964 (R. 11-13); Amendment to Plea in Abatement, July 29, 1964 (R. 14-16); Motion to Dismiss Complaint as Amended, September 6, 1966 (R. 33-35).

Testimony was taken at hearings before a Commissioner duly appointed by the President pursuant to the provisions of Rule 12, Section B (A-6), and due notice was given of such hearings as required by Rule 13, Section B (A-6). The Petitioner, through his attorney, participated in these hearings and subjected the witnesses presented by the Grievance Committee to thorough cross-examination. The Petitioner chose not to testify in his own behalf and his refusal to answer certain questions propounded to him by counsel for the Grievance Committee becomes immaterial to these proceedings in view of the dismissal of Charge 8, which describes this action on the Petitioner's part.

The Petitioner's statement that his many motions and objections, etc., "were summarily overruled", is misleading. At the final hearing before the Board of Commissioners on March 3, 1967, the Petitioner was permitted

to present oral argument with regard to each of his various motions and objections. Furthermore, the Petitioner was permitted to file with the Board of Commissioners a lengthy brief concerning these motions and objections and he distributed copies of such brief to each member of the Board prior to March 3, 1967. After argument on both the law and facts, the Board found the petitioner not guilty of Charges 1, 2, 3, 4, 10 and 11, and found him guilty of Charges 5, 6, 7 and 9. Upon review of the proceedings before the Board of Commissioners, the Supreme Court of Alabama considered the action of the Board of Commissioners without any presumption as to the correctness of the Board's findings on questions of law and fact.

Title 46, Section 25, Code of Alabama, 1940, provides:

> "The supreme court may, and on petition of the party aggrieved must, in any case of suspension or disbarment from practice, review the action of the board, and may, on its own motion, and without the certification of any record, inquire into the merits of the case and take any action agreeable to their judgment. Rules regulating the manner of such review and providing for the certification of the evidence, or if the supreme court desire, the taking of additional evidence, shall be promulgated by said board and become effective upon approval by the supreme court."

From a review of the above described procedure and the record in this case, it can readily be seen that the statutes and rules involved do not offend any principles of justice so rooted in the traditions and conscience of the people of the United States as to be ranked as fundamental and are well within the power of the Judicial Department of the State of Alabama to promulgate in order to purge the roster of the Supreme Court of Alabama of officers deemed unfit. **Speiser v. Randall**, 357 U. S. 424.

We are to be guided in this case by the standards established by this Court to insure that an attorney is accorded due process in a disciplinary proceeding. The opinion in **Theard v. United States**, 354 U. S. 278, contained the following:

> "It is not for this Court, except within the narrow limits for review open to this Court, as recently canvassed in **Konigsberg v. State Bar of California**, 353 U. S. 252, 77 S. Ct. 722, and **Schware v. Board of Bar Examiners**, 353 U. S. 232, 77 S. Ct. 752, to sit in judgment on Louisiana disbarments, and we are not in any event sitting in review of the Louisiana judgment. While a lawyer is admitted into a federal court by way of a state court, he is not automatically sent out of the federal court by the same route. The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included. The court's control over a lawyer's professional life derives from his relation to the responsibilities of a court. The matter was compendiously put by Mr. Justice Cardozo, while Chief Judge of the New York Court of Appeals. 'Membership in the bar is a privilege burdened with conditions,' (Matter of Rouss, 221 N. Y. 81, 84, 116 N. E. 782, 783.) The appellant was received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice.' People ex rel. **Karlin v. Culkin**, 248 N. Y. 465, 470-471, 162 N. E. 487, 489, 60 A. L. R. 851. The power of disbarment is necessary for the protection of the public in order to strip a man of the implied representation by courts that a man who is allowed to hold himself out to practice before them in 'good standing' so to do."

As stated in **Ex parte Wall**, supra:

> "In all cases, that kind of procedure is due process of law which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts. 'Perhaps no definition,' says Judge Cooley, 'is more often quoted than that given by Mr. Webster in the Dartmouth College case: "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern."' " Cooley's Const. Lim. 353.
>
> "The question what constitutes due process of law within the meaning of the Constitution, was much considered by this court in Davidson v. New Orleans, 96 U. S. 97; and Mr. Justice Miller, speaking for the court, said: 'It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case.'"

CONCLUSION.

The Board of Commissioners of the Alabama State Bar and the Supreme Court of Alabama in a proceeding which commenced on June 30, 1964, concluded as a result of numerous hearings concerning both the fact and the law, that the petitioner, Thomas W. Sullivan, does not possess those requisites of character and fitness which entitled him to have his name remain on the roster of the officers of the Supreme Court of Alabama entitled to practice law in said State. For the reason stated herein, it is re-

spectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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